84-288

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

THE SACRAMENTO BEE, Published by McClatchy Newspapers, a California corporation,
Petitioner,

VS.

THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SACRAMENTO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA MUNICIPAL COURT, FOR THE COUNTY OF SACRAMENTO

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QUESTIONS PRESENTED

1. Whether the press and public have a qualified First Amendment right to attend preliminary hearings.

2. Whether California Penal Code section 868, which purports to give the trial courts power to exclude the press and public from preliminary hearings, is unconstitutional.[1]

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[1]The parties to the proceeding in the Municipal Court were the People of the State of California and Ronny William Mozingo. Petitioner appeared through its counsel in opposition to the defendant's motion to close pretrial proceedings including the preliminary hearing.

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	1
Constitutional provisions involved	2
Statement of the case	3
Reasons for allowance of the writ	9

Appendices

1	Order of the California Supreme Court dated May 24, 1984	A-1
2	Order of the California Court of Appeal Third Appellate District dated March 29, 1984	A-2
3	Order of the California Municipal Court for the County of Sacramento dated March 3, 1984	A-3

TABLE OF AUTHORITIES

Cases

Page

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 9, 11

Press-Enterprise v. Superior Court, 464 U.S. ..... (1984) 9, 10

San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498; 179 Cal. Rptr. 772; 638 P.2d 655 (1982) 10

Waller v. Georgia, ... U.S. ..... (no. 83-321 decided May 21, 1984) 9

United States Constitution

United States Constitution:

Amendment 1 ..... 2, 7, 9, 10, 11

Amendment 6 2

Amendment 14 3

United States Statutes

28 U.S.C. § 1257(3) 2

California Statutes

California Penal Code:

§ 242 3

§ 243 3

§ 868 ..... i, 3, 7, 10, 11

Rules

Supreme Court Rules:

Rule 21(h) 7, 8

Rule 28.1 1

No.

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OCTOBER TERM 1983

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA MUNICIPAL COURT, FOR THE COUNTY OF SACRAMENTO

OPINIONS BELOW

No opinion was issued, reported or unreported, in the courts below.

JURISDICTION

The order of the California Supreme Court denying hearing was dated May 24, 1984 (App. 1); the order of the California Court of Appeal, Third Appellate District denying the petition for writ of prohibition was dated March 29, 1984 (App. 2); the order of the California

[2]In compliance with Rule 28.1 of the Rules of the Supreme Court, petitioner provides the following listing of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates: McClatchy Newspapers; Anchorage Daily News, Inc.

Municipal Court for the County of Sacramento excluding petitioner from the preliminary hearing and "all pretrial proceedings in the [municipal] court" and sealing the records of such proceedings was made on March 3, 1984 (App. 3).

On June 25, 1984 the criminal charges against Ronny William Mozingo in the underlying action were dismissed by the respondent prior to trial. As recently as August 3, 1984, the court refused to allow the press access to the sealed preliminary hearing transcript and records.

The statutory provision believed to confer on this Court jurisdiction to review the order in question is 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for redress of grievances."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment 14, section 1:

> "... no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ...

California Penal Code section 868:

> "The [preliminary] examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who was present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 867 of the Penal Code."

STATEMENT OF THE CASE

In this action Ronny William Mozingo is charged with three counts of battery in violation of California Penal Code sections 242 and 243 arising from a confrontation with two Sheriff's deputies in the Sacramento County jail (the "assault case"). Mr. Mozingo is currently in custody awaiting trial on charges of the rape and murder of his

step-mother on December 18, 1979 (the "death penalty case"). His conviction for these crimes was recently reversed by the California Supreme Court based on incompetence of counsel. *People v. Mozingo,* 34 Cal.3d 926 (1983). His dual prosecutions have attracted public interest.

On March 13, 1984 petitioner and other representatives of the press and public were excluded from the preliminary hearing in the assault case and "all pretrial proceedings in the [municipal] court" and from access to the records of such proceedings.

Petitioner appeared through its counsel in opposition to the proposed closure and, despite petitioner's oral request, the magistrate made no specific findings to support its conclusion that closure was essential to preserve the defendant's Sixth Amendment rights; nor is the order narrowly tailored to serve that interest. The magistrate further failed and refused to consider whether alternatives were available to protect the defendant's interest in a fair and impartial trial which were less intrusive on the First Amendment rights of the press and public.

The municipal court's minute order (App. 3) states in its entirety: "Mot[ion] to close prelim[inary hearing] and seal prel[iminary hearing] transcript. Granted."

Because all pretrial proceedings were closed and the transcript is still sealed, petitioner does not know what matters were considered by the municipal court. On June 25, 1984 the assault charges were dismissed prior to trial. The prosecutor has filed a notice of appeal. The death penalty case is still pending.

The record before the municipal court was devoid of facts to support the magistrate's ruling. The entire record consisted of a two page notice of motion and motion "to exclude pretrial publicity" and a declaration of defendant's counsel, Jerry L. Chong in support of the motion attaching seven newspaper articles, only one of which related to the instant assault case. Two articles reported that the death penalty case would be retried. The other four articles related to Douglas Mozingo, Ronny Mozingo's uncle who is a defendant in another murder prosecution pending in the California Superior Court for the County of Sacramento. These few articles were factual and dispassionate.

Mr. Chong's declaration provided in its entirety:

"I, Jerry L. Chong, declare as follows:

"1. I am the attorney appointed to represent Defendant Ronny William Mozingo in the above-entitled action;

"2. The Defendant is charged with three counts of violation of Penal Code Section 242/243;

"3. Defendant is further charged in Superior Court with Case No. 57063 which is a death penalty case. Defendant is represented by attorneys Fern Laethem and Charles Bloodgood in that case;

"4. Defendant's case in Superior Court was reversed by the California Supreme Court on the grounds that previous counsel failed to investigate possible mental defense;

"5. Defendant's uncle, Douglas Mozingo is currently pending a death penalty case in Municipal Court. Douglas Mozingo is charged with three counts of violation of Penal Code Section 187 with special circumstances, nine counts of violation of Penal Code Section 664/187, one count of

violation of Vehicle Code Section 23110(b) and various enhancement allegations. Douglas Mozingo's charges arises out of a 1982 mass shooting and slayings at the Mother Lode Bar. Said incident has received prominent media coverage since that time.

"6. On February 8, 1984, the charges against Douglas Mozingo were dismissed in Superior Court. This resulted in intense media coverage which quoted angry statements from members of the District Attorney's Office. The ground for the dismissal was based upon the actions of Douglas Mozingo's former attorney.

"7. Douglas Mozingo has been identified by the news media as the uncle of Defendant Ronny William Mozingo.

"8. Douglas Mozingo and Defendant Ronny William Mozingo have been charged with death penalty cases; both are currently in Municipal Court; both have had their cases reversed for errors relating to actions by prior counsel; both of their cases have received prominent news media coverage and both defendants have the same last name and are related to one another.

"9. That any additional pretrial publicity may prevent Defendant Ronny William Mozingo from receiving a fair and impartial trial because of the similar names and similar circumstances involved in the death penalty cases of Douglas and Ronny William Mozingo.

"10. I am informed and believe that similar Motions to Preclude Pretrial Publicity will be filed in the death penalty cases by the attorneys representing Defendant Ronny William Mozingo and Douglas Mozingo.

"I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of March, 1984, at Sacramento, California. [signature]"

On March 15, 1984 petitioner filed a direct petition for writ of prohibition or mandate in the California Supreme Court. On March 16, 1984 the California Supreme Court transferred the petition to the Court of Appeal, Third Appellate District. On March 29, 1984 the court of appeal summarily denied the petition.

On April 6, 1984 petitioner filed a petition for hearing in the California Supreme Court. On May 24, 1984 the California Supreme Court summarily denied the petition. Chief Justice Bird and Associate Justice Mosk voted to grant hearing. (App. 1).

At each stage of the proceedings, petitioner asserted that the press and public have a qualified First Amendment right to attend preliminary hearings and that California Penal Code section 868, as applied, violated that right. Petitioner's objection to closure was initially made orally. Thereafter petitioner filed written memoranda of points and authorities in both the California Supreme Court and the Court of Appeal, Third Appellate District. Each court summarily rejected petitioner's contention that closure of the preliminary hearing and other pretrial proceedings violated its First Amendment rights.

To show that the federal question was raised below as required by United States Supreme Court Rules, Rule 21(h), the points argued below are set forth: (1) mandate and prohibition are necessary to correct the respondent court's prejudicial disregard of the petitioner's constitu-

tional rights (Memorandum of Points and Authorities in Support of Petition for Writ of Prohibition or Mandate at pp. 14-16); (2) the press and public have a constitutional right of access to court records and to attend criminal trials including pretrial proceedings (*id.* at pp.16-19); (3) United States Supreme Court decisions determine the standard and procedures by which the constitutionality of closing official court proceedings must be tested (*id.* at pp.19-22); (4) respondent's order closing pretrial proceedings does not satisfy the requirement that it be effective to protect defendant's rights (*id.* at p.22); (5) respondent's restrictive order fails to consider less restrictive alternatives (id. at pp.22-24).

Petitioner's petition for hearing to the California Supreme Court also satisfied Rule 21(h). The points argued were (1) hearing in the California Supreme Court is necessary to clarify the public's constitutional and statutory rights of access to preliminary hearings (Memoradum of Points and Authorities in Support of Petition for Hearing at pp.5-6); (2) the press and public have a constitutional right of access to court records and to attend criminal trials including pretrial proceedings (*id.* at pp.6-9); (3) United States Supreme Court decisions determine the standard and procedures by which the constitutionality of closing official court proceedings must be tested (*id.* at pp.9-11); (4) applying the mandate of the United States Supreme Court and the California Legislature, respondent's "finding" of necessity was insufficient to support closure of the preliminary hearing and transcript (*id.* at pp.11-14).

REASONS FOR ALLOWANCE OF THE WRIT

By failing, upon request of petitioner, (1) to require a factual showing, (2) to make specific findings, (3) to consider alternatives or (4) to tailor narrowly its order, prior to exercising its purported power under California Penal Code section 868 to exclude the press and public from the preliminary hearing in this action, the California Municipal Court for the County of Sacramento decided an important question of federal law which has not been, but should be, settled by this Court. Respondent's decision that the press and public have no qualified First Amendment right to attend preliminary hearings, conflicts with applicable decisions of this Court.

In *Waller v. Georgia,* ..... U.S. ..... (no. 83-321 decided May 21, 1984) this Court extended the accused's Sixth Amendment right to a public trial beyond actual proof at trial to the pretrial suppression hearing. The Court noted that it had not reached the question whether the press and public have a qualified First Amendment right to attend pretrial hearings although the Court had recently extended that right to the *voir dire* proceeding in which the jury is selected. *Press-Enterprise Co. v. Superior Court,* 464 U.S. ..... (1984). Moreover, a majority of the justices had concluded in *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979) that the press and public's First Amendment right extends at least to pretrial suppression hearings. *Id.* at 397 (Powell, J. concurring); *id.* at 406 (Blackmun, J. joined by Brennan, White, and Marshall, J.J. dissenting in part).

Contrary to these decisions, the California Supreme Court has found that the press and public have no right of access to preliminary hearings under the federal constitution.

San Jose Mercury-News v. Municipal Court, 30 Cal.3d 498, 506; 179 Cal.Rptr. 772, 777; 638 P.2d 655, 660 (1982). Yet, whether or not exclusion of evidence is an issue at the preliminary hearing, the hearing may turn out to be, as it was in the underlying action, the only judicial proceeding of substantial importance that takes place during criminal prosecutions. In many cases it may provide the sole occasion for public observation of the criminal justice system. Id. 30 Cal.3d at 511; 179 Cal.Rptr. at 779, 780; 638 P.2d at 662, 663. Further, in California suppression-of-evidence issues often are heard during the preliminary hearing. *Id.*

California Penal Code section 868 violates the qualified First Amendment right of the press and public to attend pretrial proceedings because it purports to empower the magistrate to close official court proceedings under circumstances which do not satisfy the requirements of *Press-Enterprise Co. v. Superior Court*, 464 U.S. ..... (1984). The California statute is consistent with the mandate of the First Amendment if but only if the magistrate's "finding" that closure is "necessary in order to protect the defendant's right to a fair and impartial trial" is measured against the same standard and meets the same procedural prerequisites for closing other pretrial and trial proceedings.

The *Press-Enterprise* decision, although not absolutely precluding closed proceedings, provides that closures "must be rare and only for cause shown that outweighs the value of openness." *Id.* (Burger, J., Opinion of the Court) Contrary to the ruling below, the Court held that closure must be "essential to preserve higher values" and "narrowly tailored to serve that interest." In addition the magistrate

must "articulate findings with the requisite specificity" and "consider alternatives to closure and to total suppression of the [court records]." *Id.* (Burger, J., Opinion of the Court). Indeed, Justice Stevens argued that the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues. *Id.* (Stevens, J., concurring).

The refusal of the California courts, including respondent, to recognize a constitutional right to attend preliminary hearings renders Penal Code section 868 unconstitutional. The record below is utterly insufficient and devoid of any findings or consideration of alternatives to justify the intrusion on the First Amendment rights of the press and public. California trial courts continue to close preliminary hearings on the most conclusory of findings such that closure orders are issued not in "rare" cases but in newsworthy cases.

This Court should allow the requested writ of certiorari to decide the issue left open in *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979). Absent a ruling of precedential value from this Court, California Penal Code section 868 will continue to be an instrument for repression of the First Amendment rights of the press and public.

August 20, 1984

Respectfully submitted,

WILLIAM B. SHUBB

Appendix 1

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
May 24, 1984

I have this day filed Order
HEARING DENIED

Bird, C.J. &
Mosk, J.
OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: 3 Civ., No. 23830
THE SACRAMENTO BEE

vs.

Muni Ct., Sacramento
(RONNY WILLIAM MOZINGO) RPI

Respectfully,

Clerk

Appendix 2

In the
Court of Appeal of the State of California
In and for the
Third Appellate District
3 Civil 23830
Sacramento 69425F

The Sacramento Bee

vs.

Muncipal Court (Sacramento); Mozingo

By the Court:

The request for stay and petition for writ of prohibition or mandate are denied.

Dated: March 29, 1984

Regan, Acting P. J.

Diepenbrock, Wulff, Plant & Hannegan, Charity Kenyon
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455 Capital Mall, #800
Sacramento, CA. 95814 (Petitioner)

Jerry L. Chong
Attorney at Law
700 "L" St., #300
Sacramento, CA. 95814 (Real Party in Interest Mozingo)

Attorney General, by
1515 "K" St.
Sacramento, CA. 95814 (Real Party in Interest People)

Hon. Leighton Hatch
Judge of the Muncipal Court
Courthouse
Sacramento, CA. 95814

Appendix 3

In the Municipal Court,
Sacramento Municipal Court District
County of Sacramento,
State of California

MINUTE ORDER

Defendant's Name	Charges	Docket No.
MOZINGO, RONNY WILLIAM	1. 242/243(c) PC 2. 242/243(b) PC 3. 242/243(b) PC	69425F

Bail Set
$18,000

Offense Date	Date Filed	Agency
1/20/84	1/25/84	SSD

Prosecutor	Defense Attorney
TEA, 2-K. PETERSON	J. CHONG APPT'D

Date	Judge	Dept.	Proceedings
3- 9-84	E. J. GARCIA	C	9:30 A.M. Stip as to disclosure of information from the files of SSD signed. Mot to close prelim and seal prelim transcript cont to PH 3/13 1:45 Mot to gag DA and witnesses denied
3-13-84	L. Hatch	N	Prel Heard. Mot to close Prelim & Seal Prelim Transcript. Granted HTA Ct 1 Cts 2, 3 a Misd to Trail To appear on 3-27-84 9 am Dept 2. Bail to remain same as set

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SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES CITED

Cases

	Page
Bridges v. California, 314 U.S. 252 (1941)	4
Gannett Co. v. DePasquale, 443 U.S. 368 (1979)	3
Globe Newspaper Co. v. Superior Court, 457 U.S. 956 (1982)	2
People v. Elliot, 54 Cal. 2d 498; P. 2d 255 (1960)	3
Press-Enterprise Company v. Superior Court, 464 U.S. ..... (1984)	1, 4
Press-Enterprise Company v. Superior Court (Diaz), ... Cal. 3d ..... (1984) (no. L.A. 31876)	1, 2, 3
San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498; 179 Cal. Rptr. 772; 638 P. 2d 655 (1982)	1, 4

Codes

California Penal Code:	
§ 868	2, 5
§ 1538.5 subds. (a)-(d), (f)	3

Texts

G. Geis, Preliminary Hearings and the Press, 8 U.C.L.A. L.Rev. 397 (1961)	3
2 J. Story, Commentaries on the Constitution p.699 (3d ed. 1858)	4

No. 84-288

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United States

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Petitioner,

vs.

THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SACRAMENTO,
Respondent.

SUPPLEMENTAL BRIEF

Pursuant to United States Supreme Court rule 22.6 this supplemental brief calls the Court's attention to a new case not available at the time that either the petitioner or respondent filed their briefs.

On December 31, 1984 the California Supreme Court decided *Press-Enterprise Company v. Superior Court (Diaz),* ..... Cal. 3d ..... (1984) (no. L.A. 31876), (Appendix 1), reaffirming its conclusion in *San Jose Mercury-News v. Municipal Court,* 30 Cal.3d 498; 179 Cal. Rptr. 772; 638 P. 2d 655 (1982), that the press and public have no right of access to preliminary hearings under the federal constitution (Appendix at A-6) and construing for the first time California Penal Code section 868 as amended in 1982. The court construes the statute to empower magistrates to close preliminary hearings without regard to the standards established by this Court's recent decision in *Press-Enterprise Company v. Superior Court,* 464 U.S. ..... (1984).

In *Press-Enterprise Company v. Superior Court (Diaz)* the California Supreme Court upheld closure of a preliminary hearing and sealing of the transcript based on "evidence of widespread publicity" (Appendix at A-2) and the trial court's "finding" that: "there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." *Id.*

The California Supreme Court's opinion specifically rejected the proposition that *Globe Newspaper Co. v. Superior Court,* 457 U.S. 956 (1982), or *Press-Enterprise Company v. Superior Court,* 464 U.S. ..... (1984), established standards or procedural requirements which govern interpretation of California Penal Code section 868. (*Id.* at A-4-A-6). The court also rejected the notion that the magistrate is bound to articulate specific factual findings capable of review. *Id.* at A-2, A-3, A-10-A-12. The decision suggests that alternatives to closure need be considered only if the party opposing closure "shows" that such alternatives would "eliminate the danger of prejudice" (*id.* at A-8) (without undue "inconvenience or expense" (*id.* at A-11)). The court imposes no procedural requirements and does not discuss what evidence is or is not admissible to show prejudice or no prejudice. It is unclear that anything other than speculation is required to support closure. Finally, the decision fails to require the resulting order to be tailored narrowly to serve an identified interest of higher value than the interests served by open government proceedings.

In sum, based on this construction of California Penal Code section 868 by the state's highest court, preliminary hearing testimony may be taken in secret in California upon a general prediction of potential prejudice to the defendant's fair trial right. Such general invocations are effectively incapable either of opposition or review.

The California Supreme Court's rejection in *Press-Enterprise Company v. Superior Court (Diaz)* of any First Amendment right of access is grounded entirely on an unsupported historical analysis rather than on an analysis of fundamental rights involved. Contrary to the California Supreme Court's bold allusion to a history of closed preliminary hearings at "common law" (Appendix at A-3), one contemporary historian of preliminary hearings concludes that such hearings were statutory, and that, consistent with the trend away from their original inquisitorial process to a proceeding which the defendant was permitted to attend, such hearings were routinely regarded in this country as public affairs. According to the same author, there was no duplication in the United States of the express provision for closed hearings (appearing in the English statutes only in 1848), and the Field Code provision adopted by California in 1872 was an historical oddity rarely invoked in the few states which adopted it until the 1960's when the California Supreme Court decided *People v. Elliot,* 54 Cal. 2d 498; P. 2d 255 (1960). G. Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L.Rev. 397, 406-411 (1961). The preliminary hearing in California now has all the attributes of a trial which led a majority of justices of the Court to conclude in *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979), that the press and public's First Amendment rights of access extend at least to pretrial suppression hearings. Indeed, in California suppression-of-evidence issues often are heard during the preliminary hearing. See California Penal Code § 1538.5, subds. (a)-(d), (f).

Whether or not the history and function of preliminary hearings in 1789 was consistent with secrecy, that history, in itself, provides little or no justification for closing the preliminary hearing of today. The California Supreme Court's purported reliance on a history of closed preliminary hearings at "common law" is ironic if not simply repugnant to its simultaneous reference to the "historical

backdrop against which the First Amendment was enacted." (Appendix at A-6, citing *Press-Enterprise Company v. Superior Court*, 464 U.S. .... (1984) (Stevens, J., concurring). With respect to freedom of speech and of the press, the First Amendment was intended to ensure greater rights than had been enjoyed under British rule. See *Bridges v. California*, 314 U.S. 252, 263-65 (1941) (and authorities cited; one purpose was to get rid of the common law on these liberties; finding that United States rejected English practice of rigidly restricting pretrial publicity); see also e.g. 2 J. Story, *Commentaries on the Constitution* at p.669 (3d ed. 1858).

Justice Stevens' concurring opinion in *Press-Enterprise Company v. Superior Court* identifies the goal of our First Amendment to protect the ability of our people to discuss freely matters related to the function of government and the concommitant need to assure access to information when it will improve public understanding and self-governance. For all the reasons set forth in this Court's recent decision, those goals are served by a presumptively open preliminary hearing.

Certainly the apparently universal belief that lay people do not understand the function of a preliminary hearing is not a reason to keep such hearings closed. In a state where the highest court characterizes preliminary hearings as "a critical step in the accusatory process" (*San Jose Mecury-News, supra*, 30 Cal. 3d at 498, 510; 179 Cal. Rptr. at 779; 638 P.2d at 662) and as, in the vast majority of cases, the only occasion for public observation of the criminal justice system (*id.* 30 Cal. 3d at 511; 179 Cal. Rptr. at 779; 638 P.2d at 662), it is vital that these hearings be closed only in rare cases for cause shown so that their function and importance can be understood.

CONCLUSION

The recent decision of the California Supreme Court discussed in this supplemental brief increases the importance of this Court's deciding the underlying questions presented by the pending petition: (1) whether the press and public have a qualified First Amendment right to attend preliminary hearings and (2) whether California Penal Code section 868 is unconstitutional. Not only respondent's ruling but now also the only decision in California of precedential value conflict with the applicable decisions of this Court.

January 14, 1985

Respectfully submitted,

CHARITY KENYON

(Appendix 1 follows)

Appendix 1

In the Supreme Court
of the
State of California

L.A. 31876

Press-Enterprise Company,
Petitioner,

v.

The Superior Court of Riverside County,
Respondent;
Robert Rubane Diaz,
Real Party in Interest.

[Filed Dec. 31, 1984]

In the instant case we consider the appropriate standard to be applied by a magistrate in determining whether the public's right of access to preliminary hearings should be limited due to the risk of impairment of a defendant's right to a fair trial.

The real party in interest, Robert Rubane Diaz, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. He was also charged with special circumstances. At the time of the preliminary hearing there were many representatives of television stations, radio stations and newspaper present.

SEE CONCURRING AND DISSENTING OPINIONS

On Diaz' motion pursuant to Penal Code section 868,[1] the court ordered the preliminary hearing closed to the press and public. The preliminary hearing was held over a period of 41 days, and Diaz was held to answer on all charges. The judge sealed all transcripts.

About seven months later, petitioner sought to gain access to the transcripts in the superior court. The prosecution joined in the motion. Diaz opposed, presenting evidence of the widespread publicity given to the case by the media, some of which had continued until the time of the hearing. The judge, concerned that releasing the transcript might require either delay of the proceedings or transfer of the trial to another jurisdiction, pointed out that defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. The judge found that "there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." He ordered that the transcript remain sealed, and petitioner commenced the instant mandamus proceeding.[2]

THE ASSERTED CONSTITUTIONAL RIGHT OF ACCESS

Prior to its 1982 amendment, section 868 provided that upon the request of the defendant, the magistrate shall exclude the public from the preliminary examination. In San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, the statute was upheld against a claim that the federal and state Constitutions give the press and public a right of access to preliminary hearings that may be foreclosed only when outweighed by defendant's interest in a fair trial and that section 868 violated that right because

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[1]Unless otherwise indicated, all statutory references are to the Penal Code.

[2]The trial has been completed. Although technically moot, the case presents an important question affecting the public interest, and review is appropriate. (San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 501, fn. 2.)

it had no provision for balancing of competing interests in individual cases.

In considering the claim of violation of federal constitutional rights, the court recognized that the United States Supreme Court has held that the First Amendment provided a qualified right of public access to the trial and that a majority of justices had recognized a qualified right of access to pretrial hearings such as suppression hearings. (30 Cal.3d at pp. 503-506.) The court pointed out that the basis of the qualified access right was the long history of trials being presumptively open and that the open trial tradition guards against persecution and favoritism, increases public awareness of the judicial process, inspires confidence in the criminal justice system, and serves the cathartic needs of the community. (30 Cal.3d at p. 505.)

In *San Jose Mercury-News*, the court also pointed out that seven of the United States Supreme Court justices had stated that preliminary hearings, unlike trials, were traditionally private at common law and were distinguishable from pretrial suppression hearings. (30 Cal.3d at pp. 504-506.) This court concluded that no right of access arose under the First Amendment. (30 Cal.3d at p. 506.)

In rejecting the claim of conflict with the California Constitution, the court recognized that state constitutional guarantees may give greater protection to some rights than the federal counterparts, but concluded that the Legislature reasonably gives fair trial rights a preference over access rights in certain classes of proceedings where danger of prejudice is strong and proof on a case-by-case basis appears difficult and that section 868 was a permitted means of protecting defendants' rights to a fair trial free of juror bias.[3] (30 Cal.3d at pp. 506-514.)

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[3]Because they bear on the proper interpretation of section 868 as amended in 1982, the policy concerns which led to the court's conclusion will be discussed in detail in the statutory portion of the opinion.

Petitioner urges that recent decisions of the United States Supreme Court require repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to a preliminary hearing. Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, involved a Massachusetts statute requiring mandatory closure of trial during the testimony of a minor sex victim. The court again relied upon the tradition of trials being open to the press and public, and it asserted that before a state may deny the right of access it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. (457 U.S. at pp. 603-607.) Responding to an argument that trials have not always been open during testimony of minor sex victims, the court in a footnote stated that whether the First Amendment right of access can be restricted in the context of any criminal trial depends not on the historical openness of that type of trial but rather on the state interests assertedly supporting the restriction. (457 U.S. at p. 605, fn. 13.) The court concluded that the Massachusetts statute was not narrowly tailored to accommodate the state's compelling interest in protecting the physical and psychological well-being of a minor and that rather than mandatory closure the state's interest may be protected by a case-by-case determination whether closure is necessary to protect the welfare of the minor. (457 U.S. at p. 608.)

The second case relied upon by petitioner is Press Enterprise Company v. Superior Court (1984) ..... U.S. ..... [78 L.Ed.2d 629, 104 S.Ct. 819], where the court held that an order closing voir dire proceedings was invalid on the ground that the trial judge had failed to consider alternative measures. In a concurring opinion, Justice Stevens stated that the purpose of the access right is assuring freedom of communication on matters relating to the functioning of government and that "the distinction between trials

and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." (..... U.S. at p. ..... [78 L.Ed.2d at p. 742, 104 S.Ct. at p. 828].)

Neither case warrants repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to preliminary hearings. Both cases were concerned with the right of access to trials rather than preliminary hearings. The problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings. In *Press Enterprise Company* the court emphasized that prejudice to the defendant remains the primary concern, stating: "No right ranks higher than the right of the accused to a fair trial." (..... U.S. at p. ..... [78 L.Ed.2d at p. 637, 104 S.Ct. at p. 823].) The main concern asserted in both cases to justify closure was not prejudice to the defendant but the interests of others, i.e., the privacy rights of prospective jurors and the physical and psychological well-being of minor sex victims.

While a footnote in *Globe Newspaper Co.* suggests that historical openness may no longer be an element of the First Amendment access right, the footnote by its own language is limited to trials. (Globe Newspaper Co. v. Superior Court, *supra,* 457 U.S. at p. 605, fn. 13.) The subsequent *Press Enterprise Company* decision not only indicates that one of the bases of the access right to trials as established by Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555 is that trials were open at the time of the adoption of the First Amendment but also devotes the first portion of the opinion to establish that at the time of the adoption of the First Amendment public jury selection was the common practice in America. While the statement of Justice Stevens relied upon by petitioner is to the effect that the access right is not limited to trials, it does not establish that historical conditions are irrelevant be-

cause he also states that the question before the court " 'focuses . . . on First Amendment values and the historical backdrop against which the First Amendment was enacted.' " (..... U.S. at p. ..... [78 L.Ed.2d at p. 642, 104 S.Ct. at p. 828].)

We conclude that petitioner and amici have failed to establish a basis for repudiating the conclusion in the 1982 decision in *San Jose Mercury-News* that the First Amendment access right does not extend to preliminary hearings. In addition, petitioner and amici have not pointed to any matters warranting repudiation of the portion of *San Jose Mercury-News* relating to the California Constitution.

THE STATUTORY ACCESS RIGHT

Shortly after the decision in 1982 in *San Jose Mercury-News,* the Legislature amended section 868 to delete the defendant's absolute right to closure and to establish a right of access to preliminary hearings. The amended section reads: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination [all but certain enumerated officials, defendant and his counsel, and the prosecuting witness and a friend.]" (Italics added.)

The parties and amici dispute the appropriate standard to be applied by the magistrate in determining whether exclusion is "necessary" in order to protect the defendant's right to a fair and impartial trial. Some of the language in the brief submitted by amici suggests that exclusion is appropriate only if the magistrate finds that failure to exclude will result in an unfair trial.

Petitioner argues for the test set forth in United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167 where the

court stated that an "accused who seeks closure must establish 'that it is strictly and inescapably necessary in order to protect the fair trial guarantee.' This burden may be discharged by demonstrating: (1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.' " *Brooklier* did not involve preliminary hearings but rather hearings on motions to suppress and the juror voir dire. The *Brooklier* test is based on the dissenting opinion of Justice Blackmun in Gannett Co. v. DePasquale (1979) 443 U.S. 368, 406, 440-446. Justice Blackmun, joined by Justices Brennan, White and Marshall, urged that the Sixth Amendment right to a public trial was not personal to the defendant but established an access right for the public. The majority rejected that view.[4]

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[4]Justice Blackmun recognized that in some cases of suppression hearings closure might be justified. "The trial judge faced with a closure motion has the more difficult task of looking into the future. I do not mean to suggest that only in the egregious circumstances of cases such as *Estes* and *Sheppard* would closure be permissible. But to some extent the harm that the defendant fears from publicity is also speculative."

"If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to suppress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at pp. 444-445.)

Defendant urges that the proper test is that the preliminary hearing must be closed upon a defendant's request if the magistrate finds "a reasonable likelihood" of substantial prejudice which would impinge upon the right to a fair trial. The trial court purported to apply this test. The test appears to be based on the concurring opinion of Justice Powell in Gannett Co. v. DePasquale, *supra,* 443 U.S. 368, 397-403. He joined the majority opinion in holding that the Sixth Amendment did not confer access rights but concluded that the First Amendment provides a limited right of access to suppression hearings. He rejected Justice Blackmun's test for closure on the ground that it was inflexible and could prejudice defendant's rights and disserve society's interest in the fair and prompt disposition of criminal trials. He concluded that the test is whether "a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury." (443 U.S. at p. 400.) He stated that it is the defendant's responsibility to show that public access would interfere with the fairness of his trial but that those opposing closure have the burden of showing that alternative procedures are available that would eliminate the danger of prejudice.[5]

The test of reasonable likelihood that the defendant will not receive a fair and impartial trial is used in considering motions for change of venue. (Odle v. Superior Court (1982) 32 Cal.3d 932, 937; Martinez v. Superior Court (1981) 29 Cal.3d 574, 578.) Also the test has been used with respect to gag orders. (Younger v. Smith (1973) 30 Cal. App.3d 138, 159-164; see Brian W. v. Superior Court (1978) 20 Cal.3d 618, 624, fn. 7.) The Legislature has established

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[5]In *Gannett Co.* the trial judge found "a reasonable probability" of prejudice, and the majority held this would overcome a First Amendment right of access.

a standard of reasonable likelihood of prejudice to the defendant to be applied in determining whether a grand jury transcript should be unsealed. (§ 938.1, subd. (b).) The test has also been applied in determining whether a purported confession should be suppressed pending trial. (Cromer v. Superior Court (1980) 109 Cal.App.3d 728, 731 et seq.)

The legislative history of the amendment to section 868 shows that the Legislature intended the courts to determine the appropriate standard. Assembly Bill No. 277 as originally introduced and as adopted opens preliminary hearings unless the magistrate finds it "necessary" to close to protect the defendant's right to a fair trial. As originally worded, the bill provided that the finding that it is necessary to close "would require a demonstration of a clear and present danger of irreparable damage to the defendant's right to a fair and impartial trial, that the alternatives to closure will not adequately protect that right, and that the closure will effectively protect against the perceived harm." In the Assembly, the second condition relating to alternatives to closure was deleted before the bill was passed.

Clear and present danger language was contained, although in slightly different form, in the bill passed by the Senate, but the Conference Committee report was rejected in the Assembly, and the bill was amended in the Assembly to substitute "preponderant probability" for "clear and present danger." The bill was amended in a second Conference Committee report to delete all of the language defining "necessary," and as finally approved, the amendment to section 868 provides no definition of "necessary." (The bill as enacted also dealt with matters other than the amendment of section 868.)

The deletion of any definition of the word "necessary" shows that, while the Legislature concluded that prelimi-

nary hearings should be public unless there was conflict with the defendant's right to a fair trial, the Legislature intended that the courts should determine the standard to be applied in weighing the public's right of access against the defendant's fair trial right.

In *San Jose Merceury-News,* the court detailed the policy factors in favor of holding preliminary hearings in public: Exposure of governmental functions to public view serves societal interests in a democratic government. Open preliminary hearings guard against persecution and favoritism, increase public awareness of the judicial process, inspire confidence in the criminal justice system, and serve the cathartic needs of the community. Preliminary hearings are an important step in the accusatorial process. There are many similarities to the trial; witnesses may be cross-examined, each side had an incentive to prevail, and the hearing may reveal weaknesses in the prosecution or defense, forecasting the ultimate disposition.

Often the preliminary hearing turns out to be the only judicial proceeding of substantial importance that takes place during a criminal prosecution because so many cases are disposed of without trial. The hearing often provides the forum for issues involving police misconduct and exclusion of evidence. The court also pointed out that pretrial publicity, even pervasive adverse publicity, does not invariably lead to an unfair trial. (30 Cal.3d at pp. 505, 509-514.)

On the other hand, the court in *San Jose Mercury-News* pointed to several concerns militating against a public preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing. While the Legislature has since amended section 868 to delete the defendant's absolute right to closure, the concerns enumerated in *San Jose Mercury-News* obviously bear upon our determination of the appropriate standard to be applied under the amended statute.

The concerns militating in favor of a right of closure recognized by the court include: The evidence at the preliminary hearing may be one-sided and misleading because the testimony is often that of the prosecution only—the defense remaining silent if it appears that reasonable or probable cause has been established. Many nonlawyers may not be aware of the function of a preliminary hearing which is not a trial with the danger that they may ascribe to a one-sided hearing the legitimacy and credibility of a trial. Magistrates may err in their evidentiary hearings, and there is a danger that highly prejudicial evidence which will be inadmissible at trial will be admitted or adverted to and reported by the media.

In addition factual, relevant reporting, no less than inflammatory publicity, may threaten a defendant's right to a fair trial by producing a jury pool "within which a defendant's guilt has already been ascribed." (30 Cal.3d at p. 512.)

Because the preliminary hearing takes place at an early stage in the criminal prosecution, it may be difficult or impossible for the defendant to make a showing of the prejudice which will occur from publicity. At an early stage, the community reaction and the media attitude may not be clear, and the defendant may have little knowledge of the prosecution's strategy and evidence. "Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on speech and press rights. (See, e.g., Nebraska Press Assn., *supra,* 427 U.S. 539, 556-560 [49 L.Ed.2d 683, 695-698]; Brian W., *supra,* 20 Cal.3d 618, 624, fn. 7.) Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; Brian

W., *supra,* 20 Cal.3d at p. 625.)" (San Jose Mercury-News v. Municipal Court, *supra,* 30 Cal.3d at pp. 511-513.)

We reject the view that a magistrate in ruling on a request to close the preliminary examination must find that in fact an open preliminary hearing will result in a denial of fair trial. At the time that the magistrate makes the finding predictions must be made as to the amount and nature of publicity which will result from an open preliminary hearing and as to the impact of the anticipated publicity. The legislative history of the two standards contemplated, "clear and present danger" and "preponderant probability," indicates that the Legislature had in mind a lesser standard than a factual finding of actual prejudice.

The legislative history of the two standards contemplated, as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. "Necessary" is often used in the sense of essential (Webster's New Internat. Dict. (2d ed. 1959) p. 1635), and the terms "clear and present danger" and "preponderant possibility" reflect that a substantial showing of potential prejudice must be made before the preliminary hearing may be closed.

The test urged by defendant, a reasonable likelihood of substantial prejudice, and the test urged by petitioner, a substantial probability of irreparable damage, meet the requirement of a substantial showing of potential prejudice. While there is some difference between the two standards, it obviously is not very great.

Weighing the language of section 868, the legislative history, and the policy factors discussed above, we conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal Code section 868 makes clear that the primary right is the

right to a fair trial and that the public's right of access must give way when there is conflict.

Once a defendant establishes a reasonable likelihood of substantial prejudice, there is a clear and present danger of prejudice, and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice. But if the showing in opposition fails to overcome the defendant's showing that there is a reasonable likelihood of substantial prejudice, it would be improper for the magistrate to jeopardize the fair trial right by permitting a public preliminary hearing. The primacy of the right to fair trial, viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial right by an open hearing.

The peremptory writ of mandate is denied. The alternative writ, having served its purpose, is discharged.

BROUSSARD, J.

WE CONCUR:
BIRD, C. J.
MOSK, J.
KAUS, J.
REYNOSO, J.

PRESS-ENTERPRISE COMPANY

v.

SUPERIOR COURT L.A. 31876

CONCURRING OPINION BY GRODIN, J.

The majority's determination that the First Amendment provides no right of access to preliminary hearings is unnecessary to the decision of this case, and I do not join in it. The only constitutional question presented is whether the First Amendment requires a *greater* right of access than the Legislature has seen fit to establish by statute. I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the "rule rather than the exception" (typed op., 16), the exception existing only when exclusion of the public is, to use the language of the statute, "necessary in order to protect the defendant's right to fair and impartial trial."

I agree also that the determination of "necessity" must inevitably be a matter of judgment based upon probabilities, and that the phrase "substantial showing of potential prejudice" (or, what amounts to the same thing, a "reasonable likelihood of substantial prejudice") constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that.

GRODIN, J.

PRESS-ENTERPRISE COMPANY

v.

SUPERIOR COURT L.A. 31876

CONCURRING AND DISSENTING OPINION
BY LUCAS, J.

I concur in the judgment but dissent to the majority's analysis. By reason of the 1982 amendment to Penal Code section 868, preliminary hearings are required to be "open and public" unless the magistrate expressly finds that exclusion of the public is "necessary" to protect the defendant's right to a fair and impartial trial. In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of *necessity*. In my view, the majority's new standard improperly ignores the statutory language.

As the majority concedes, "The legislative history . . . as well as its use of the word 'necessary,' makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. 'Necessary' is often used in the sense of essential . . . ." (*Ante*, p. ..... [maj. opn. at p. 16].) Although a showing of *actual* prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a *substantial probability* of prejudice. (See United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here.

As the trial is completed and the case is now moot, I concur in the judgment denying the peremptory writ.

LUCAS, J.

ORIGINAL

Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-288

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE SACRAMENTO BEE, Published by McClatchy Newspapers, a California Corporation,

Petitioner,

v.

THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SACRAMENTO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA MUNICIPAL COURT FOR THE COUNTY OF SACRAMENTO

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

	Page
Gannett Co. v. DePasquale 443 U.S. 368	4
Globe Newspapers Co. v. Superior Court, Etc. _____U.S._____	5
Nebraska Press Assn. 427 U.S. 529	3,5
People v. Elliot (1960) 54 Cal.2d 498	2
People v. Mozingo (1983) 34 Cal.3d 926	1
Press Enterprise Co. v. Superior Court of Cal. 464 U.S._____	4
Richmond Newspapers, Inc. v. Virginia 448 U.S. 555	5
San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498	3
Times-Picayune Pub. Corp. v. Schulingkamp 419 U.S. 1301	5
Waller v. Georgia, _____U.S._____	4

United States Constitution

United States Constitution:

Amendment 1	2
Amendment 5	3
Amendment 6	3
Amendment 14	3

California Statutes

California Penal Code:

Section 242	1
Section 243(c)	1
Section 868	1, 2, 4, 5

OPINIONS BELOW

No opinion was issued in the courts below.

JURISDICTION

The facts relating to the Court's jurisdiction in this matter are as set forth in the Petition, pages 1 and 2, under the heading "Jurisdiction".

STATEMENT OF THE CASE

In the underlying criminal action, the Real Party in Interest, RONNY WILLIAM MOZINGO, was charged with three counts of battery and battery against a custodial officer in violation of California Penal Code sections 242 and 243(c), respectively. The charges arose from an altercation with Sacramento County Sheriff's deputies at the county jail, where the Real Party was, and currently is, awaiting re-trial on charges of the rape and murder of his step-mother on December 18, 1979. His conviction of those crimes, for which he had been sentenced to death, was reversed by the California Supreme Court based on incompetence of counsel. People v. Mozingo (1983) 34 Cal.3d 926.

Because of the publicity generated by the death penalty case, and by the concurrent prosecution of the Real Party's uncle, DOUGLAS MOZINGO, for three counts of first degree murder, with special circumstances and nine counts of attempted murder, counsel for the Real Party moved that the preliminary hearing in the battery case be closed to the public pursuant to Penal Code section 868[1]. Defense counsel's declaration in support of said motion is set forth in the Petition at pages 5 through 7.

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1. "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the

On March 13, 1984, the Municipal Court granted the Real Party's motion to close the preliminary hearing over the objection of petitioner. On March 15, 1984, petitioner filed a direct petition for writ of prohibition or mandate in the California Supreme Court. On March 16, 1984, the California Supreme Court transferred the petition to the Court of Appeal, Third Appellate District. On March 29, 1984, the court of appeal summarily denied the petition. On April 6, 1984, petitioner filed a petition for hearing in the California Supreme Court, which summarily denied the petition on May 24, 1984.

At each stage of the proceedings, petitioner asserted that the press and the public have a qualified First Amendment right to attend preliminary hearings and that California Penal Code section 868 violated that right.

REASONS FOR DENYING THE WRIT

The main purpose of California Penal Code section 868 is to protect the defendant's right to a fair trial. At the preliminary examination, the magistrate determines whether there is reasonable or probable cause to bind the defendant over for trial in superior court. The testimony is very often that of the prosecution only. Penal Code section 868 protects the defendant's right to an impartial and unbiased jury by preventing dissemination of this testimony by the media prior to trial. [People v. Elliot (1960) 54 Cal.2d 498, 504; 354 P.2d 225] Penal Code section 868 also protects the reputation of the person who is unjustifiably accused of crime. [Id. at pp. 504-505]

The California Supreme Court rejected the contention that Penal Code section 868 is an unconstitutional infringement of the public's

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1. (continued)
prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 867 of the Penal Code."

right to attend preliminary hearings in San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 638 P.2d 655. The court weighed the public's right of access to judicial proceedings, examining "the traditional availability of the source to public scrutiny as well as the relative benefits and burdens of recognizing access rights." [Id., 30 Cal.3d, 498 at p. 509] The court found that the nature and timing of preliminary hearings present dangers that public access may prejudice fair trial rights guaranteed to the accused under the Fifth, Sixth and Fourteenth Amendments. Factual and relevant reporting may be just as unfair as inflaminatory or misleading publicity if it produces a jury pool which is convinced of the defendant's guilt before trial. [Id., 30 Cal.3d 512]

The court further found in San Jose Mercury-News that an evaluation of the type requested by petitioner in the instant case, findings, and consideration of alternatives to closure, are not practicable with respect to preliminary hearings and are not required. [Id., 30 Cal.3d 498, at p. 513]

> Case-by-case evaluation may be appropriate with respect to trials and pretrial suppression hearings conducted after the defendant has been bound over. But a preliminary hearing may be held as early as two days after arraignment or plea unless the prosecution shows good cause or the defendant waives time. In any event it must occur within 60 days after arraignment or plea unless defendant consents to further delay. (Pen. Code, Section 859b)
>
> Often, therefore, it is impossible for defendant to make a showing that in his case prejudice is likely and closure justified. The evidence required may not be available at an early stage, when community reaction and the media's attitude are not clear. Moreover, defendant may have little knowledge before the hearing of the prosecution's strategy and evidence That additionally clouds his ability to prove the value to him of closure.
>
> Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on speech and press rights. (see, e.g. Nebraska Press Assn., supra, 427 U.S. 529,556-560 [49 L.Ed. 2d 683, 695-698]...Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends, VI, XIV; Cal. Const. Art I § 15) (San Jose Mercury-News v. Municipal Court, supra, 30 Cal.3d 498, 513)

The cases cited by petitioner do not support its contention that the public has a qualified First Amendment right to attend preliminary hearings. Waller v. Georgia, ____U.S._____; 104 S.Ct. 2210 (1984) held that closure of a suppression hearing to the public over the objection of the defendant, violated his Sixth Amendment right to a public trial. It should be noted that the jury had been empaneled prior to the hearing of the suppression motion and that this was therefore not a pretrial hearing.

Press-Enterprise Co. v. Superior Court of Cal. 464 U.S._____; 104 S.Ct. 819 (1984) held that the vior dire examination of potential jurors could not be closed to the public absent findings that closure was essential and consideration of alternatives to closure. This Court made a detailed review of the history of the jury trial and found that the selection of jurors has "presumptively been a public process with exceptions only for good cause shown." [Id., 104 S.Ct. 819, 822] This case does not support petitioner's contentions because jury selection is not truly a pretrial or preliminary proceeding, but an integral part of the trial process itself.

Gannett Co. v. DePasquale 443 U.S. 368 (1979), in section V reviewed in detail the history of the public trial at common law, and found"...there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary. By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant. And pretrial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials. 99 Under English common law, the public had no right to attend pretrial proceedings." [Id., at pp. 387-389] This Court went on to cite California Penal Code section 868 as an example of an explicit provision relating to closed pretrial proceedings. [Id., at p. 391, fn. 23] This court held in Gannett that the public has no independent constitutional right to insist upon access to a

pretrial judicial proceeding, in this case, a suppression hearing.

Richmond Newspapers, Inc. v Virginia 448 U.S. 555 addressed the issue of whether the public has a constitutional right to attend criminal trials. This Court held that the First Amendment guarantee the right to attend criminal trials, but does not support petitioner's contention that there is any First Amendment right to attend preliminary or pretrial hearings.

Globe Newspapers Co. v. Superior Court, Etc. _____U.S._____, 102 S.Ct. 2613 (1982) struck down as violating the First Amendment, a Massachusetts statute which required the exclusion of the public from the courtroom during the testimony of minor victims in the trials of specified sex offenses. This case expressly dealt with the public's right to attend trials, and did not deal with the issue of the right of the public to attend preliminary or pretrial hearings.

This Court has recognized that restraints upon the press prior to trial are not necessarily and in all cases invalid. [Nebraska Press Assn. v. Stuart 423 U.S. 1327 (1975)] A footnote in Times - Picayune Pub. Corp. v. Schulingkamp 419 U.S. 1301 (1974) suggests closure of pretrial hearings as an alternative to an order imposing direct limitations on media reporting to protect the defendants from prejudicial pretrial publicity, and cites California Penal Code section 868. [Id., at p. 1308, fn. 3]

The cases cited by petitioner deal with exclusion of the public during the trial phase of the criminal prosecution, "a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard." [Nebraska Press Assn. v. Stuart, supra, at p. 1332] Petitioner has failed to demonstrate that it, or the public, has a First Amendment right to attend preliminary hearings.

California Penal Code section 868 protects defendants' right to a fair trial before an unbiased jury upon the finding, explicit or necessarily impled, that exclusion of the public is necessary to protect that right. It is submitted that this provision is constitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 27, 1984

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RONNY WILLIAM MOZINGO

CERTIFICATE OF SERVICE BY MAIL

I, NANCY A. REGAN, a member of the Bar of the Supreme Court of the United States and counsel for RONNY WILLIAM MOZINGO, Real Party in Interest herein, hereby certify that on December 27, 1984, pursuant to Rule 28.3, Rules of the Supreme Court, I served one copy of the attached BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AFFIDAVIT OF RONNY WILLIAM MOZINGO on each of the parties herein by depositing such copies in the United States Post Office, Fair Oaks, California, with first class postage prepaid, properly addressed to the post office addresses of the parties as follows:

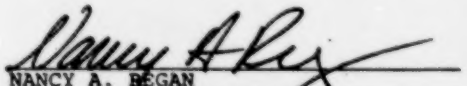
JOHN DOUGHERTY
KEN PETERSON
Sacramento County Dist. Atty.
901 G Street
Sacramento, CA 95814

HON. LEIGHTON HATCH
Judge, Municipal Court
720 Ninth Street
Sacramento, CA 95814

WILLIAM B. SHUBB
CHARITY KENYON
DIEPENBROCK, WULFF, PLANT & HANNEGAN
455 Capitol Mall, Suite 800
Sacramento, CA 95814

All parties required to be served have been served.

Dated: December 27, 1984



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